JUDGES, FAIRNESS AND LITIGANTS IN PERSON

EVAN BELL*

INTRODUCTION

Trying cases in which a party represents himself "can be amongst the more difficult judicial tasks".[1] Judges who preside at trials where one party is self-represented are often faced with continuous challenges, the most vexing of which is how to ensure a fair hearing in the circumstances.[2] The court must be sensitive to the problems facing personal litigants, some of whom may be lacking in confidence, unassertive, inarticulate and daunted at the prospect of appearing for the first time in an unfamiliar setting,[3] and others of whom are obsessive litigants, determined to leave no procedural stone unturned.[4]

Self-represented parties are facing courts today with "an ever increasing frequency".[5] While the right to represent oneself is fundamental, the presence of personal litigants in increasing numbers creates a problem for the courts because the contribution of most litigants in person in the preparation and conduct of their cases is not of the same standard as that of counsel. Litigation involving self-represented litigants is therefore usually less efficiently conducted and tends to be prolonged. Consequently, the costs for opposing litigants are increased and the drain upon

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* Master, Queen's Bench and Matrimonial Divisions, Court of Judicature for Northern Ireland.

[1] *Williams v. Lemas and Anor* [2009] E.W.C.A. Civ. 360. The Chief Justice of Canada has stated that self-represented litigants "impose a burden on courts", leading to judges being "stressed and burned out": "The Challenges We Face", Speech by Beverley McLachlin, Toronto, the 8th March 2007.

[2] *Director of Child and Family Services (Man.) v. J.A.* [2006] M.B.C.A. 44 (CanLII).

[3] *R (on the application of Dirisu) v. Immigration Appeal Tribunal* [2001] E.W.H.C. Admin. 970.

[4] "Review of the Legal Year 2002 – 2003", Court of Appeal, Civil Division.

[5] *Baziuk v. BDO Dunwoody Ward Mallette* (1997) 13 C.P.C. (4th) 156 (Ont. Gen. Div.). The reasons underlying this trend are varied: withdrawal of legal insurance, ineligibility for legal aid, impecuniousness, and, in some cases, believing they can present their case better than counsel.

court resources is considerable.[6] The difficulties presented by self-represented litigants are a result of their entering an arena where adversarial litigation is designed to be conducted by persons with professional skills. In the absence of competent legal representation, the court does not receive the assistance that it ought in relation to questions of law and fact, and a burden is placed upon it to assist the litigants.[7]

This article draws on jurisprudence from a number of jurisdictions and examines the principles that judges apply when self-represented litigants conduct litigation. It then examines how these principles are outworked in practical terms in particular aspects of the litigation process.

I. COMMON CHARACTERISTICS OF SELF-REPRESENTED LITIGANTS

A. Lack of Knowledge

The most common characteristic of self-represented litigants is a lack of legal knowledge. Litigants will usually not understand procedural rules or technical rules of evidence. This creates a number of difficulties. First, it is common for personal litigants to believe that courts have powers which they simply do not possess.[8] Secondly, personal litigants may fail to distinguish between different procedural tools, for example requests for particulars and interrogatories, and may seek to use one when another is appropriate.[9] Thirdly, because the law may appear "complicated and difficult"[10] to personal litigants, they may make applications which are "wholly misconceived".[11]

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[6] *Cachia v. Hanes* [1994] H.C.A. 14.

[7] *Kenny v. Ritter* [2009] S.A.S.C. 139.

[8] *Re W (Permission to Appeal)* [2007] E.W.C.A. Civ. 786. Many personal litigants incorrectly consider courts to have the power to right what the litigants perceive to be past wrongs and to give them a hearing on the merits which they crave: *S v. S* [2006] E.W.C.A. Civ. 1617.

[9] *Cabot Investment Ltd. v. Smith t/a French Tarts Patisserie* [1998] E.W.C.A. Civ. 1100.

[10] *Perfect Pizza Ltd. v. Kaima* [1997] E.W.C.A. Civ. 2185.

[11] *Arora (t/a Practice Disposal Agency) v. Joseph (t/a Stuart Joseph & Co)* [1997] E.W.C.A. Civ. 2093.

Fourthly, litigants may seek to rely on legislation which does not exist and, even if it had existed, would not have helped them.[12]

Such difficulties are not, of course, universal. Some personal litigants may advance their cases with considerable skill because of a professional legal background[13] and, even lacking such a background, self-represented litigants may present their submissions clearly and cogently, with a complete grasp of all the complications of the case.[14]

B. Lack of Objectivity

A second common characteristic is that self-represented litigants may lack objectivity. Their submissions may not be entirely rational but rather "diffuse, confused and overlaid with an enormous sense of injustice" which extends to anyone connected with the case, including the judiciary.[15] Indeed they may attribute every forensic defeat to the bias of the court, and, in particular, to a bias against personal litigants.[16] A personal litigant is often disadvantaged through being unable dispassionately to assess and present his case in the same manner as opposing counsel.[17] This "inability to see his cause other than subjectively"[18] is a more profound difficulty than the frequent one of being a person at risk of losing his livelihood, who has his mind in such a muddle that a simple case can seem grotesquely complicated in such a way that he is unable to concentrate on the points that matter.[19]

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[12] *James v. Puglia* [1997] E.W.C.A. Civ. 1051.
[13] *Re M (children)* [2007] E.W.C.A. Civ. 1363; *Bryant and another (t/a Bryant Hamilton & Co) v. Weir* Employment Appeal Tribunal UKEAT/0253/04/DM; *Sawyer v. Secretary of State for the Department of Work and Pensions (Job Centre Plus)* Employment Appeal Tribunal UKEAT/0133/08/LA.
[14] *Parkins v. Mayor and Burgesses of the London Borough of Westminster* [1997] E.W.C.A. Civ. 2170.
[15] *Forrester Ketley and Co v. Brent* [2003] E.W.H.C. 1847 (Pat).
[16] *Faryab v. Smyth and Another* (Court of Appeal (Civil Division), unreported, 27 January 2000).
[17] *Dietrich v. R* [1992] H.C.A. 57.
[18] *Re B (a child)* [2004] E.W.C.A. Civ. 197.
[19] *Pine v. Law Society* (Court of Appeal (Civil Division), unreported, 16 February 2001).

C. Difficulty with Appreciating Relevance

A third common characteristic of self-represented litigants is that they may not appreciate what matters are relevant to the legal issues which are being raised.[20] This difficulty in appreciating relevance can lead to a number of consequences. First, a personal litigant may provide the court with excessive amounts of material.[21] A considerable amount of evidence may be "at best peripheral and at worst irrelevant".[22] Secondly, personal litigants often have difficulty in distinguishing between points of some substance, points of little substance, and points which are utterly trivial. It may, for example, be incorrectly suggested that the fact that one deponent makes an error of a few days in referring to the date of another deponent's affidavit, or that, after an affidavit has been supplied in draft, but is then sworn with a last-minute change, is evidence of fraud or abuse of process.[23] Litigants can therefore lack the capacity to distinguish between what is worth pursuit and what must necessarily be abandoned.[24] This creates a tendency to approach matters with a "scatter shot" technique; that is, they seek to attack every single aspect of a matter. Inevitably this makes it more difficult for a court to focus upon the precise issues that lie within its jurisdiction.[25] Thirdly, judges may occasionally have to restrain personal litigants from drifting into irrelevant or inappropriate issues.[26] It may require a judge to take a firm line in keeping a litigant to relevant matters.[27] Such case management interventions will be necessary to keep the case on track, and will be in addition to interventions directed simply at ascertaining

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[20] *Port of London Authority v. Ashmore* [2009] E.W.H.C. 954 (Ch.).
[21] *R (on the application of Davies) v. Commissioners Office and another* [2008] E.W.H.C. 344 (Admin.).
[22] *Re Drivertime Recruitment Ltd. and another company* [2004] E.W.H.C. 1637 (Ch.).
[23] *Faryab v. Smyth* [1999] E.W.C.A. Civ. 1018.
[24] *T (Children)* [2001] E.W.C.A. Civ. 1045.
[25] *Orisejaro v. Virgin Trains Ltd.* Employment Appeal Tribunal EAT/1243/98.
[26] *Weatherill and another v. Lloyd's TSB Bank p.l.c.* (Court of Appeal (Civil Division), unreported, 18 December 2000).
[27] *Williams v. Lemas and Anor* [2009] E.W.C.A. Civ. 360.

what the litigant is trying to say.[28] Unfortunately it is frequently the position that litigants believe the court is biased, in circumstances where the judge is simply seeking to ensure that the proceedings are conducted within sensible limits and is trying to get the parties to focus on what is relevant.[29] Fourthly, a personal litigant may not appreciate the relevance of a point made by his opponent and, despite an opportunity to adduce evidence, might not fully understand the nature of that opportunity and the importance of taking it in terms of the litigation's outcome.[30] Fifthly, through failure to appreciate its relevance, a personal litigant may fail to understand that particular material needed to be brought to court. The court must then balance the possible advantages to be gained by an adjournment against the disadvantages of the additional costs to the parties and to the public purse from not adjourning.[31] Sixthly, because self-represented litigants "often pursue irrelevant matters *ad nauseam*", an inability to appreciate relevance unduly prolongs proceedings.[32]

II. THE PRINCIPLES TO BE APPLIED

An examination of how courts deal with litigation involving self-represented litigants demonstrates that there are three general principles which are applied.

A. Fairness

The primary principle applied by judges in cases involving self-represented litigants is the principle of fairness. Fairness is the touchstone which enables justice to be done to all parties. A judge in proceedings involving a self-represented litigant must balance the duty of fairness to that litigant with the

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[28] *Shodeke v. Hill and Others* Employment Appeal Tribunal UKEAT/0394/00/RN.

[29] *Da'Bell v. National Society for Prevention of Cruelty to Children* Employment Appeal Tribunal UKEAT/0044/08/LA.

[30] See, for example, *Denekamp v. Pearce (Inspector of Taxes)* [1998] S.T.C. 1120.

[31] *O'Brien v. Hertsmere Borough Council* [1998] E.W.H.C. Admin. 35.

[32] *Lees Import and Export (Pty) Limited v. Zimbabwe Banking Corporation Limited* (1999) 4 SA 1119 (ZSC).

rights of the other party, and with the need for as speedy and efficient a judicial determination as is feasible. Achieving this balance is one of the most difficult challenges a judge can face.[33] While a trial judge's overarching responsibility is to ensure that the hearing is fair, it is not unfair to hold a self-represented litigant to his choice to represent himself. A litigant who undertakes to do so in matters of complexity must assume the responsibility of being ready to proceed when his case is listed. If he embarks upon the hearing of his case, he is representing to the court that he understands the subject-matter sufficiently to be able to proceed. Although it may later become patently obvious that he is not, litigants who choose to represent themselves must accept the consequences of their choice. While the court will take into account the litigant's lack of experience and training, implicit in the decision to represent himself is the willingness to accept the consequences that may flow from that lack.[34] Indeed, to hold to the contrary would mean that any party could derail proceedings by dismissing his representatives.[35]

It is the court's duty to minimise the self-represented litigant's disadvantage as far as possible, so as to fulfil its task to do justice between the parties.[36] However, the court should not confer upon a personal litigant a positive advantage over his represented opponent[37] nor is it the position that the party with the greater expertise must be disadvantaged to the point at which they have the same expertise effectively as the other party. That would be a perversion of what is required, which is a fair and equal opportunity to each party to present his case. Judges therefore have to be careful when they are faced with a self-represented litigant, that they do not become so solicitous for his welfare that they think of points which, on reflection, they would have given very short shrift but which, because they thought of

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[33] *Director of Child and Family Services (Man.) v. J.A.* [2006] M.B.C.A. 44 (CanLII).
[34] *Wagg v. Canada (F.C.A.)* [2004] 1 F.C. 206.
[35] *R v. Broadhead* [2006] E.W.C.A. Crim. 3062.
[36] *Hussey v. Dillon and others practising under the style and title of Gerrard Scallan and O'Brien* (Irish High Court, unreported, Costello J., 23 June 1995).
[37] *Rajski v. Scitec Corporation Pty Ltd* (New South Wales Court of Appeal, unreported, Samuels J.A., 16 June 1986).

them themselves, develop a curious appeal of their own, so that, if anything, the advantages lie with the unrepresented party.[38]

In *Davids v. Davids*[39] the Ontario Court of Appeal held that the fairness of a trial is not to be measured by comparing a litigant's conduct of his own case with the conduct of that case by a competent lawyer. If that were the measure of fairness, judges could only require litigants to proceed to trial without counsel in those rare cases where a self-represented litigant could present his case as effectively as counsel. Fairness does not demand this. Rather, it demands that he have a fair opportunity to present his case to the best of his ability. Nor does fairness dictate that the self-represented litigant have a lawyer's familiarity with procedures and forensic tactics. It requires that the judge attempt to accommodate the litigant's unfamiliarity with the process so as to permit him to present his case. In doing so, the judge must respect the rights of the other party. In *Davids* the personal litigant understood the issues to be litigated; he had a full appreciation of the factual circumstances; he had a full opportunity to present his own case and to challenge the case presented for the other side; and he presented the case he chose to present. It may have been very different from the case a competent lawyer would have presented, but that did not make the trial unfair.

Fairness must be understood in the context of Article 6 of the European Convention on Human Rights. In civil proceedings which involve the determination of civil rights and obligations, there is no right as such under the Convention to have legal representation. However, issues may arise where lack of legal aid has the effect of depriving an individual of effective access to the courts. The question whether the provision of legal representation is necessary for a fair hearing must be determined on the basis of the particular facts and circumstances of each case, and will depend, *inter alia*, on the importance of what is at stake for the individual in the proceedings, the complexity of the relevant law and procedure and the individual's capacity to represent himself effectively.[40] In respect of criminal proceedings, the right to a fair

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[38] *Chilton and another v. Saga Holidays p.l.c.* [1986] 1 All E.R. 841.
[39] [1999] CanLII 9289 (ON CA).
[40] *Steel and Morris v. United Kingdom* (2005) 41 E.H.R.R. 22.

trial includes both the right to defend oneself and the right, where certain conditions are met, to have free legal representation.[41] Importantly, the right to have adequate time and facilities for the preparation of one's case applies in criminal proceedings, and is implicit in the notion of a fair trial in civil matters *mutatis mutandis*.[42]

B. A Degree of Latitude

The second principle applied by judges is that personal litigants will be granted a degree of latitude in running their cases. This has been variously described as "considerable latitude", "considerable indulgence"[43] and assistance to "any reasonable degree".[44] It should not, however, be an automatic assumption that a self-represented litigant requires assistance.[45] In *Pezos v. Police*[46] the Supreme Court of South Australia held that there is no single rule of universal application, no talisman, which applies in those cases where a party is self-represented. What a judge must do to assist a personal litigant depends on the litigant, the nature of the case and the litigant's intelligence and understanding of the case. Hence the individual circumstances of each self-represented litigant will have to be considered, as well as the nature of the issues, if not also the demands, of each case.

The assistance which a personal litigant ought to receive from the court should be limited to that which is necessary to diminish, so far as is possible, the disadvantage which he will ordinarily suffer when faced by a lawyer, and to prevent destruction from the traps which adversarial procedures offer to the unwary and untutored.[47] The allowance therefore appropriate

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[41] *Pakelli v. Germany* (1984) 6 E.H.R.R. 1.
[42] *Albert and Le Compte v. Belgium* (1983) 5 E.H.R.R. 533.
[43] *Treissman v. Sagehall (66 Holland Park) Ltd* [2007] E.W.H.C. 3401 (Ch.).
[44] *CSO Valuations AG v. Centreleigh Ltd. and others* (Court of Appeal (Civil Division), unreported, 16 February 2000).
[45] *Kenny v. Ritter* [2009] S.A.S.C. 139.
[46] [2005] S.A.S.C. 500.
[47] *Rajski v. Scitec Corporation Pty Ltd.* (New South Wales Court of Appeal, unreported, Samuels J.A., 16 June 1986).

to a personal litigant who has qualified as a solicitor will be significantly reduced because of his qualifications.[48]

The duty to assist a self-represented accused in criminal proceedings is likely to be more extensive than that imposed on a judge hearing civil proceedings.[49] An accused's need for guidance will vary depending on the offence, the facts, the defences raised and the accused's sophistication. The judge "is required within reason to provide assistance to the self-represented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect".[50]

Where a judge accords a personal litigant some latitude, a point comes where that can begin to operate unfairly, prejudicially, and over-expensively on the opposing party.[51] Latitude granted to self-represented parties ought never to extend to the degree where courts do not give effect to existing law, or where the rights of self-represented litigants are permitted to override the rights of represented parties.[52] Nor should it change the essential nature of the proceedings as adversarial.[53] Judges are required delicately to maintain a level balance to the playing field. Give the personal litigant no help and he will complain: take too active a role and the other side complains. There is no easy way out of that dilemma. It is left to the individual good sense of the judge to decide how and when to intervene, the circumstances varying infinitely.[54]

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[48] *R (on the application of Grierson) v. Office of Communications (Ofcom) and others* [2005] E.W.H.C. 1899 (Admin.).

[49] *Minogue v. Human Rights and Equal Opportunity Commission* [1999] F.C.A. 85.

[50] *R v. McGibbon* [1988] CanLII 149 (ON CA). A trial judge should not, however, be required to instruct a litigant on the nuances and subtleties of an extremely complicated body of knowledge. Nor should the trial judge be suggesting theories or weaknesses that ought to be pursued. That would be patently unfair to the opposing party and so onerous a duty as to be impossible: *R v. Laycock* [1996] OJ No 3846 (QL) (Gen. Div.).

[51] *Knowles v. Knowles* [2008] E.W.C.A. Civ. 788.

[52] *Baziuk v. BDO Dunwoody Ward Mallette* (1997) 13 C.P.C. (4th) 156 (Ont. Gen. Div.).

[53] *Boylan-Toomey v. Boylan-Toomey* [2008] N.I.Fam. 15.

[54] *Re (A Child) (residence order)* [2009] E.W.C.A. Civ. 445. A litigant's lack of representation may be the occasion for repeated requests for leeway and

C. Limited Interference

The third principle applied by judges is that judicial interference with normal procedures and practices should be as limited as possible. The scope of a judge's assistance to a self-represented litigant should be limited to what is reasonable, and should not extend to provision of the kind of advice that counsel could be expected to provide. A judge must exercise great care not to descend from the bench and place himself "in the impossible position of being both advocate and impartial arbiter".[55] It is not part of his role to stand in the shoes of counsel acting for the litigant or unduly interfere with the conduct of the hearing on the litigant's behalf.[56] A practice that the judge becomes counsel for a self-represented litigant, extending a "helping hand" to guide, for example, an accused throughout a criminal trial so as to ensure that any defence is effectively presented to the jury, is flawed because a trial judge and a defence counsel have such different functions that any attempt by the judge to fulfil the role of the latter is bound to cause problems. A judge cannot investigate the facts, advise and direct the defence, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.[57] Although there may be a tendency to want to even the scales by assisting the self-represented litigant to develop his case or to attack the opponent's case, that is a tendency to be detected and resisted. The judge's role is to keep the ring, not to enter the fight.[58]

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indulgences, and for repeated excuses for non-compliance with court orders: *Great Future International Ltd. and others v. Sealand Housing Corporation and others* [2001] All E.R. (D) 05 (Nov).

[55] *R. v. Phillips* [2003] A.B.C.A. 4 (CanLII). The court observed that the judge must not "become a spectre at the accused's counsel table".

[56] *Kenny v. Ritter* [2009] S.A.S.C.

[57] *Powell v. Alabama* (1932) 287 U.S. Reports 61.

[58] "The Role Of The Judge", Speech by Sir Gerard Brennan, Chief Justice of Australia, National Judicial Orientation Programme, Wollongong, the 13th October 1996.

A trial judge thus faces something of a dilemma. While he may be bound to provide some assistance to a self-represented litigant, he should not intervene to such an extent that he cannot maintain a position of neutrality in the litigation. Nevertheless, the boundaries of legitimate intervention are flexible and will be influenced by the need to ensure a fair and just trial.[59] While interventions may also be necessary for the purpose of ensuring trial efficiency,[60] too many interventions may prevent a litigant from properly presenting his case to the court, and so the frequency of the judge's interventions should not be excessive. A judge must also be careful as to the tone of his interventions. He is entitled to guide a personal litigant to ensure that he concentrates on the essential issues but he "must be a shepherd and not a wolf", and must not transiently move from the judgment seat to join opposing counsel in the arena in harrying the personal litigant.[61] It is a common problem that a jury may perceive unfairness in the interventions which a judge often has to make when dealing with a case conducted by a personal litigant.[62] It is important, therefore, that where, so as to be fair to a self-represented litigant, a judge takes a more active part in a trial than he would otherwise do, he points out to any jury why he is doing

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[59] *Minogue v. Human Rights and Equal Opportunity Commission* [1999] F.C.A. 85. There must, however, be a limit to the indulgence which personal litigants can reasonably expect. The desirability in principle of giving such assistance must always be balanced against the need to avoid injustice or hardship to the other party on the particular facts of each case. The manner and extent of such assistance should generally be treated as a matter for the judgment of the court, and not as subject to rigid rules of law: *Mensah v. East Hertfordshire HNS Trust Court of Appeal* [1998] I.R.L.R. 531. A trial judge must not assume so active a role on behalf of the self-represented litigant that he gives the appearance that he was assisting him to the detriment of the represented party. One of the potential impacts of such an intervention is that counsel for the represented party may be "unnerved in the presentation of the case" and may thereby be deprived of the opportunity to put his client's case properly before the court: *Cicciarella v. Cicciarella* [2009] CanLII 34988 (ON S.C.D.C.).

[60] *Jimenez v. Azizbaigi* [2008] B.C.S.C. 1465 (CanLII).

[61] *Re R (Children: Judicial Intervention in Proceedings)* [2001] E.W.C.A. Civ. 1880.

[62] *Gentoo Group Ltd (formerly known as Sunderland Housing Co Ltd) and another v. Hanratty* [2008] E.W.H.C. 2328 (Q.B.). Such interventions may be necessary in order to enable the court fully to understand the litigant's case.

it and corrects any impression which they might otherwise gain that the judge is hostile to the opposing party's case.[63] A judge need be much less inhibited when there is no jury present.[64] Nevertheless, experience suggests that, at least during the trial stage, the less said by a judge the better, especially in the case of an obsessed litigant.[65]

In *Family and Children's Services of Cumberland County v. D.M.M.*[66] it was recognised that, by "excessive interference" in an effort to assist self-represented parties to put their case before the court, a trial judge could impair his impartiality. Likewise, excessive intervention by the trial judge can breach his duty to observe procedural fairness to both parties, so constituting an error of law.[67]

Research conducted amongst judges in England and Wales has demonstrated that the level of judicial intervention varies significantly. Some judges suggested that their interventions are quite modest; others advocated a much more direct engagement. For these judges, the role of neutral arbiter was abandoned in favour of an "inquisitorial judge".[68] One example of this latter tendency may be found in *Weatherill v. Lloyds TSB Bank p.l.c.*,[69] where the trial judge remarked that he had endeavoured to bear in mind the handicap attaching to the personal litigant and had, where appropriate, endeavoured to investigate for himself aspects of the case which might otherwise have passed the personal litigant by. However, describing the

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[63] *Pamplin v. Express Newspapers Ltd (No 2)* [1988] 1 All E.R. 282.

[64] *Gentoo Group Ltd. (formerly known as Sunderland Housing Co Ltd) and another v. Hanratty* [2008] E.W.H.C. 2328 (Q.B.).

[65] "Self Represented Litigants", Speech to the Magistrates' Conference, Justice Pierre Slicer, Supreme Court of Tasmania, the 14th June 2004.

[66] *Family and Children's Services of Cumberland County v. D.M.M.* [2006] N.S.C.A. 75 (CanLII).

[67] *Burwood Municipal Council v. Harvey* (1995) 86 L.G.E.R.A. 389.

[68] Moorehead and Sefton, "Litigants in Person: Unrepresented Litigants in First Instance Proceedings", Department of Constitutional Affairs, Research Series 2/05, March 2005.

[69] *Weatherill v. Lloyds TSB Bank p.l.c.* (Court of Appeal (Civil Division), unreported, 18 December 2000).

judicial role as including an "inquisitorial function" is arguably incorrect.[70]

III. APPLYING THE PRINCIPLES

How then are these three principles applied in practical terms by judges hearing cases involving self-represented litigants?

A. The Application of Court Rules

Procedural rules exist to provide guidance, fairness and consistency so that litigation can be conducted on as level a playing field as possible. The granting of immunity to one litigant from the application of the rules would result in the denial of rights to other litigants and, ultimately, in the redundancy of the rules altogether. Nevertheless, a liberal construction is not the same thing as ignoring the rules.[71] The court should therefore relax procedural rules in favour of a personal litigant where the failure to do so may work an injustice. This approach, although sometimes necessary, must be cautiously exercised. If it is not, the inevitable result will be injustice to the represented party. If justice is to be done between the parties, the court must hold an even hand between them. In that endeavour, the rules must be the servant and not the master of the court and so, while there must be a reasonable degree of flexibility, it remains essential that both parties be required to abide by the rules.[72] The concept that rules are to be applied to all parties, whether represented or not, is a characteristic of equality under the law.[73] In *Serrano v. Dan-Goor Ltd*[74] a litigant in person had had immense difficulty in presenting her case in a way which complied with the rules of court. The

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[70] *Muschett v. HM Prison Service* [2010] E.W.C.A. Civ. 25.

[71] *Bergen et al v. Manitoba et al* (1998) 125 Man.R. (2d) 65.

[72] *Great West Life Assurance Co. v. Royal Anne Hotel Co.* [1986] CanLII 980 (BC C.A.). The Judicial Studies Board for England and Wales guidance in respect of family law cases is: "The usual rules of procedure may need to be revised and relaxed; you are in charge of your own procedure". See *Family Bench Book*, para. 4.3.

[73] *Ford and another v. Metropolitan Police Commissioner* [2006] E.W.H.C. 3223 (Q.B.).

[74] *Serrano v. Dan-Goor Ltd.* [2008] E.W.H.C. 2323 (Q.B.).

court observed that, while allowances were made for personal litigants, procedural rules applied equally to such litigants and to represented parties. The court therefore struck the case out, stating that personal litigants cannot be allowed simply to go their own way and claim that they had failed to comply with court orders because they could not obtain the necessary help.

The court's task of doing justice between the parties may require a relaxation of the rules relating to the presentation of evidence in order to understand the plaintiff's case.[75] A personal litigant should not be denied the opportunity of presenting his case to the court by a strict application of procedural rules. Fairness involves the balancing of the personal litigant's imperfect knowledge of rules and procedures with the right of the other party to know the legal and factual issues that he must meet. Non-compliance with the rules will be treated in a different way than imperfect compliance.[76]

In *Fegol v. National Post Co*[77] the Manitoban Court of Appeal considered the consequences of a statement of claim not being served in accordance with procedural rules, and how strictly those should be enforced against a self-represented litigant. The judge had found that the respondents had received notice of the claim, although they had not been formally served with the statement of claim in accordance with the rules. The judge had ordered that service "as already effected" be deemed good. The court, however, took the view that rules with respect to service were important, and must not be easily disregarded. Rather than being "mere technical requirements", they provided an essential framework for the conduct of the

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[75] *Hussey v. Dillon and Others practising under the style and title of Gerrard Scallan and O'Brien* (Irish High Court, unreported, Costello J., 23 June 1995). Of course, as Costello J. noted, the court can only act on evidence which is legally admissible.

[76] *Coleman v. Pateman Farms Ltd* [2001] M.B.C.A. 75 (CanLII). Querulous litigants may delight in reading procedural rules and mounting arguments in relation to them. Unfortunately they sometimes misunderstand the effect of a rule or part of a rule read in isolation. This imposes a duty on a judge in striking a balance to draw the true effect of the rules to the attention of the personal litigant. See, "Striking A Balance: The Judge's Role", Speech by Justice Robert Nicholson, Prato, Italy, the 30th June 2006.

[77] [2007] M.B.C.A. 27 (CanLII).

court's business. It concluded that to validate the plaintiff's actions as service would send the wrong message that the rules could be ignored by self-represented litigants. The essential element of fairness that guided all proceedings did not demand that rules be ignored when one of the parties was self-represented. Fairness must be demonstrated to the self-represented litigant but also to the represented party. There were not two sets of procedures, that is one for lawyers and one for self-represented parties. A personal litigant was therefore as much subject to the rules as any other litigant. As the New South Wales Court of Appeal observed, judges must be patient in explaining the rules and may be lenient in the standard of compliance which it exacts, but it must see that the rules are obeyed, subject to any proper exceptions. To do otherwise, or to regard a personal litigant as enjoying a privileged status, would be quite unfair to a represented opponent.[78]

B. Pleadings

Pleadings drafted by self-represented litigants can suffer from a number of potential defects. First, litigants may draft blizzards of lengthy and argumentative pleadings.[79] In *Barnes v. Handf Acceptances Ltd*[80] the pleadings were excessively long and the trial judge sought a very substantial reduction in the particulars of claim, from 24 pages of pleading to some 10 pages in length. Of course length is not automatically a defect and some lengthy pleadings may nevertheless be properly, articulately and logically drafted.[81]

Secondly, pleadings may be unclear. It is not always an easy task at the commencement of a hearing to clarify precisely what the complaint of a personal litigant is.[82] A statement of claim may be hopelessly inadequate to launch sensible civil

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[78] *Rajski v. Scitec Corporation Pty Ltd* (New South Wales Court of Appeal, unreported, Samuels J.A., 16 June 1986).

[79] *Rankine v. American Express Services Europe Ltd and others* (Queen's Bench Division (Birmingham District Registry), unreported, Judge Simon Brown, 16 May 2008).

[80] [2005] E.W.C.A. Civ. 314.

[81] *Flaxman-Binns v. Lincolnshire County Council* [2003] E.W.H.C. 2704 (Q.B.).

[82] *Henry v. London Borough of Newham* [2004] E.W.C.A. Civ. 377.

proceedings but the self-represented litigant may argue that, as he is not a lawyer, the precise form of complaint should not matter.[83] A personal litigant may be "inevitably handicapped in expressing the basis of his claim" with the particulars of claim being "diffuse, opaque and on occasion wholly incoherent, and in large measure very difficult to penetrate". That fact on its own does not drive the claimant from the judgment seat.[84] The general approach therefore adopted by courts is that personal litigants should be given the benefit of any lack of clarity in a pleaded case and it should be interpreted with appropriate latitude.[85] In *Hinds v. Liverpool County Court, Liverpool City Council*[86] the court bore in mind that the litigant had complied with court orders in serving five further witness statements and that together, these statements and the claim made it reasonably clear what his case was against each defendant, albeit it was prolix and not pleaded in a conventional manner. Nevertheless the court must have regard to the way in which a litigant puts his case. The Hong Kong Court of Appeal has held that, although a self-represented litigant may not be expected to use legal terminology that does not relieve him of the need to ensure that pleadings are clear. A personal litigant cannot simply pour out his story and ask the court to sort out his legal rights because he himself is ignorant what rights may have been breached or how. A pleading cannot be like a set of instructions to the judge as if he were the personal litigant's counsel. That is not the function of the court in an adversarial system. Having said that, a court is entitled in the exercise of its discretion to be a little more lenient to a personal litigant in giving him an opportunity to get things right.[87]

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[83] *HM Attorney-General v. Haralabidis* (Queen's Bench Division (Crown Office List), unreported, Schiemann L.J., 28 November 1997).

[84] *Mehta v. Mayer Brown Rowe and Maw (a firm) and another* [2002] E.W.H.C. 1689 (Q.B.).

[85] *Merelie v. Newcastle Primary Care Trust* [2006] E.W.H.C. 150 (Q.B.).

[86] [2008] E.W.H.C. 665 (Q.B.).

[87] *Chan Kong v. Chan Li Chai Medical Factory (Hong Kong) Ltd. & Ors* [2008] H.K.C.U. 1407. Even where the pleadings are "well structured and set out with reasonable clarity", the judge may have to go over them carefully with a personal litigant in order to make sure that he understands the case that the litigant wishes to make, and to check that the substantive case is not obscured by any technical drafting deficiency: *Merelie v. Newcastle Primary Care*

In *Tobin v. Dodd and others*[88] the Supreme Court of Western Australia expressed the view that impugned pleadings from personal litigants should be examined to ensure that there was no viable cause of action which, with appropriate amendment or permissible assistance from the court, could be put into proper form. The court held that it was necessary to examine with some care the claim which the litigant wished to make and to determine whether, notwithstanding some idiosyncratic features in the proposed pleading, it nevertheless alleged a series of facts which, if proved, would entitle the litigant to some relief which the court could grant. In this respect it was essential to bear in mind that the litigant need only plead facts which, if established, would justify the court in granting relief, and that he was not obliged to plead or assert the legal significance which he contended attached to the alleged facts or any conclusions of law to be drawn from those facts.

Thirdly, pleadings may be incomplete. In an ideal world, parties are required to put their full claims against each other and their responses to those claims in their pleadings. However, where a party is put to no real disadvantage, the court will not limit the trial to the pleadings. It is considered to be the merest technicality to insist on formal amendments to the pleadings when all the matters which are in dispute between the parties are raised at the hearing and the opportunity is given to answer the points raised.[89] Of course the court must be careful not to allow a personal litigant to take the other party by surprise. That would be unfair. When considering applications from self-represented litigants to amend pleadings, judges must be careful only to allow appropriate amendments. In *English Churches Housing Group v. Shine*[90] (in which the claimant was finally awarded £8,000) the original claim was for £260,000, and the judge allowed

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Trust; Merelie v. Newcastle Primary Care Trust and others [2006] E.W.H.C. 1433 (Admin.).

[88] [2004] W.A.S.C.A. 288. Nevertheless, the court, although it will try to assist litigants in person as far as it can, is not in a position itself to extend legal drafting services to litigants: *Crozier v. Midland Bank p.l.c. and others* [1997] EWCA Civ 2843.

[89] *Assiouti v. Hosseini* (Court of Appeal (Civil Division), unreported, 26 November 1999).

[90] [2004] E.W.C.A. Civ. 434.

amendments of "ludicrous proportions" to amend the claim to £5 million. The Court of Appeal strongly criticised the judge, since such explicit judicial encouragement of what could "only be described as a fantasy" that the court would enrich the claimant to such an extent played a substantial part in both the litigant's subsequent behaviour and the prolongation of the proceedings.

Pleadings prepared by laypersons must be construed generously, and in the light most favourable to the litigant. Lay litigants should not be held to the same standard of accuracy, skill and precision in the presentation of their case as that required of lawyers. Regard must be had to the purpose of the pleading as gathered not only from the content of the pleadings but also from the context in which the pleading is prepared. Form must give way to substance.[91] Where pleadings are prepared by self-represented parties, courts should not therefore be too legalistic in their approach, providing that the opposing party knows the case it has to meet and has a proper opportunity to do so.[92] In *Mendel v. Jacobs and Others*,[93] following an application to strike out the statement of claim, the court explored with the litigant the true basis for each claim so as to deal with each application by reference to the yardstick of whether the statement plainly disclosed, or if it were amended could disclose, reasonable grounds for bringing the claim.

Mere inexperience in matters of pleading will not excuse serious non-compliance with the requirements of procedural rules which are, after all, based on notions of justice and fair play to both sides in litigation.[94] There will therefore be occasions when a self-represented litigant's pleadings are so defective that they will be struck out. While the court has to be sympathetic to personal litigants, that does not mean that defendants can be put to unlimited expense in actions which are so incomprehensible that it is impossible for any defendant to meet them. To allow such proceedings to proceed to trial would be a clear abuse as the

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[91] *Xinwa and Others v. Volkswagen of South Africa (Pty) Ltd* [2003] Z.A.C.C. 7.
[92] *Pousson v. British Telecommunications p.l.c.* [2005] All E.R. (D) 34 (Aug).
[93] *Mendel v. Jacobs and Others* [2009] E.W.H.C. 1211 (Q.B.).
[94] *Viljoen v. Federated Trust Ltd* [1971] (1) SA 750.

court has to be fair both to both parties.[95] In *Addoo v. Newham Healthcare NHS Trust*[96] the litigant had ample opportunity to specify what his case was, and it was made quite plain to him what the consequences of his failure to do so might be. He failed to provide full particulars and his claim was struck out. In *Sachs v. Mayfords*[97] the litigant prepared documents which were intended to perform the function of pleadings but which were totally unsuitable for the purpose. Her attempt to plead her case was a narrative account which did not identify any causes of action and did not formulate a sustainable claim in a way that could be submitted to a trial. Since the purpose of litigation is to resolve disputes and arrive at just results, parties have to provide the material for that conclusion. The plaintiff did not meet that requirement and her claim was struck out.

C. Oral Submissions

While some oral submissions from personal litigants can be persuasive;[98] articulate;[99] knowledgeable;[100] and cogent;[101] others may be ill-conceived;[102] unfocused;[103] liberally referring to case law sadly not on point;[104] and so rebarbative that they are difficult for the court to engage with.[105]

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[95] *Sachs v. Mayfords* (Court of Appeal (Civil Division), unreported, Hobhouse L.J., 1 May 1997).
[96] Employment Appeal Tribunal EAT/1423/98.
[97] *Sachs v. Mayfords* (Court of Appeal (Civil Division), unreported, Hobhouse L.J., 1 May 1997).
[98] *Re B (A Child) (Supervised Contact)* [2004] E.W.C.A. Civ. 197.
[99] *Re T (A Minor) (Parental Responsibility: Contact)* [1993] 2 F.L.R. 450.
[100] *Re Ewing* (Queen's Bench Division, unreported, Davis J., 20 December 2002).
[101] *S and others v. Chapman and another* [2008] E.W.C.A. Civ. 800.
[102] *Director of Child and Family Services (Man.) v. J.A.* [2006] M.B.C.A. 44 (CanLII).
[103] *Elt v. Orsler and another* [2001] E.W.C.A. Civ. 1226.
[104] *Treacy v. District Judge McCarthy* [2008] I.E.H.C. 59.
[105] *Benveniste v. Kingston University* Employment Appeal Tribunal UKEAT/0008/07/JOJ. In *Smolen v. London Borough of Tower Hamlets* [2006] E.W.H.C. 3628 (Ch.) the court observed that while the appellant was a layman, he was a very experienced litigator and, as such, he had abused his position as a litigant in person. That was demonstrated by his outburst when he reminded the judge of his rights under Article 6 of the ECHR and suggested this gave him a right to say anything that he liked and the court was required to listen to

The core judicial obligation is to attempt to understand the arguments being made by a personal litigant.[106] A judge should attempt to clarify the substance of the litigant's submissions especially in cases where, because of garrulous or misconceived advocacy, the substantive issues are either ignored, given little attention or obfuscated.[107] Where a personal litigant has difficulty in expressing his arguments in strictly legal terms, the court will endeavour to assist him to do so.[108] Nevertheless while a judge may assist a personal litigant to present his case, he is not expected to cast around looking for some better way in which the case might possibly be put[109] or creating new arguments which the litigant has not advanced.[110]

One of the principal difficulties personal litigants experience is a difficulty in differentiating between their roles as an advocate and as a witness.[111] Thus they may, in effect, attempt to give evidence at a time when they are supposed to be making submissions to the court. Judges often allow litigants latitude, permitting them to give evidence without the disadvantage of being cross-examined at that point.[112]

In terms of case management it may be reasonable to assist a personal litigant by steering him through the issues set out in a skeleton argument.[113] Another strategy adopted by judges is that of hearing the represented party first. Even where a self-represented litigant might usually have the first say, having a legal representative clearly setting out the facts of a dispute

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him for a full two hours, which was the time that he had "booked" for the purpose of the hearing. The judge held that this was of course to misunderstand the position. He had a right to present arguments, but provided those arguments are relevant and not mere tirades of abuse. He was not entitled to make wild allegations unsupported by evidence.

[106] *Newson v. Kexco Publishing Co Ltd* [1995] CanLII 1182 (BC C.A.).

[107] *Re F* [2001] Fam.C.A. 348.

[108] *Michael Colin Geoffrey McMullen v. Noel Clancy (No. 2)* [2005] 2 I.R. 445.

[109] *Edusei v. Ledwith and Another* Employment Appeal Tribunal EAT/1326/95.

[110] *Newson v. Kexco Publishing Co.* [1995] CanLII 1182 (BC C.A.)

[111] *Indigo International Holdings Ltd. and another v. Owners and/or Demise Charterers of the vessel "Brave Challenger"; Ronastone Ltd. and others v. Indigo International Holdings Ltd. and another* [2003] E.W.H.C. 3154 (Admin.).

[112] *R v. Broadhead* [2006] E.W.C.A. Crim. 3062.

[113] *R v. Broadhead* (previous note).

before calling on a personal litigant can be advantageous for the judge's understanding of a case.[114] Furthermore, a personal litigant may find it easier to respond to another party's submissions than to be heard first.[115]

Where the legal submissions made by a personal litigant are defective, judges should resist any temptation to do their own legal research. They should found a decision solely on an analysis of the evidence and case law which has been properly discussed by the parties before them.[116]

D. Written submissions

The quality of written submissions by personal litigants is also highly variable. Some will be clear and concise, containing admirable legal research.[117] Others may be incoherent[118] and to a large extent repetitious, with complaints re-appearing a number of times under different headings and in different contexts.[119] On occasion judges may rearrange a litigant's points into a presentation which can be more easily understood in a court of law.[120] However, no matter how poorly prepared a submission may be, it is always possible that lurking behind the disorganised material is a point worthy to be considered by the court.[121]

Jafari-Fini v. Skillglass Ltd[122] is an example of how judges will often allow a litigant latitude in relation to written

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[114] *Small v. Cadogan Estate; Same v. Laurence Murphy (a firm); Earl Cadogan v. Small* (Court of Appeal (Civil Division), unreported, Brooke L.J., 4 March 1999).
[115] *Kappler v. Secretary of State for Trade and Industry* [2006] E.W.H.C. 3694 (Ch.).
[116] *Phillip Drakard Trading Ltd. v. Customs and Excise Commissioners* [1992] S.T.C. 568.
[117] *Wilson v. William Sturges & Co.* [2006] E.W.H.C. 792 (Q.B.).
[118] *Topgro Greenhouses Ltd. v. Houweling* [2006] B.C.C.A. 183 (CanLII) (2006).
[119] *Re Accelerated Drying Systems Limited, Clemo v. Powell* (Chancery Division (Companies Court), Parker J., 31 July 1997).
[120] *Magee v. Grace and another* (Court of Appeal (Civil Division), unreported, Wilson J., 19 July 1999).
[121] "Working As A High Court Justice", Speech by Justice M.H. McHugh to the Women Lawyers Association of New South Wales and the Law Society of Newcastle, Newcastle, the 17th August 2005.
[122] [2006] E.W.H.C. 77 (Ch.).

submissions. The claimant, after the hearing had concluded, made a written application to supplement his written and oral closing submissions. He applied on the basis that, as a personal litigant opposed by counsel and faced with the demands of the trial, he had not been sufficiently prepared on the final day of the hearing to be able to meet fully the defendants' submissions. The claimant made it clear that he was not seeking a further hearing and would not oppose the defendants having an opportunity to respond. The judge allowed the further written submissions, giving the defendants an opportunity to respond to them.

E. Evidence in Chief

The type of latitude a personal litigant may require in terms of evidence in chief will vary from litigant to litigant. The Canadian courts have indicated that a trial judge may assist a litigant by advising him how to present his evidence, by helping him frame non-leading questions, by suggesting lines of questioning that might be appropriate, and by asking questions that assist him in introducing his evidence.[123] The Australian Family Courts have adopted a similar approach, indicating that trial judges should explain to a self-represented party, for example, the effect, and perhaps the undesirability, of the interposition of witnesses and his right to object to that course. A judge may also provide general advice to a personal litigant that he has the right to object to inadmissible evidence, and to inquire whether he so objects. A judge is not, however, obliged to provide advice on each occasion that particular questions or documents arise. If a question is asked, or evidence is sought to be tendered in respect of which the personal litigant has a possible

[123] *In Family and Children's Services of Cumberland County v. D.M.M* [2006] N.S.C.A. 75 (CanLII). This may not of course be sufficient. In *Qureshi v. Commonwealth Bank of Australia* [2009] N.S.W.C.A. 421 a personal litigant called no evidence at trial challenging an expert witness's methodology. On appeal he sought to explain this in his submissions by saying that he was a litigant in person without the experience to know he needed his own expert, and without the resources to retain one. The New South Wales Court of Appeal held that, even if true, this did not permit the court to set aside the judge's findings.

claim of privilege, the judge should inform the litigant of his rights.[124]

The approach in England and Wales is also to grant significant latitude. A judge may take active steps to ascertain whether a litigant wants to compel the attendance of a particular witness.[125] A judge may allow a personal litigant to put leading questions to his own witnesses.[126] A judge may stagger the timing of expert witnesses in order to allow a litigant time to prepare for each witness.[127] A judge may ensure a litigant does not suffer any unfair disadvantage by being deprived of the opportunity to give any evidence he thinks relevant to the issues in the case whether or not it is in his written witness statement.[128] Where a witness statement barely addresses an issue, a judge may give the witness an opportunity to give an account in oral evidence and may himself ask questions to the witness in an attempt to provide focus.[129] In *R v. Ulcay*[130] the judge had prepared a list of questions on broad topics which the defendant could consider dealing with in evidence if he decided to give evidence. The judge explained that, if the defendant wished to give evidence he could do so but that he could not give evidence in his closing speech. In *R v. Broadhead* [131] the judge allowed the defendant to call witnesses in any order he chose and to recall witnesses to ask questions he had forgotten to ask. The Judicial Studies Board has advised that, although it is right to restrain irrelevant or inadmissible evidence, a judge should show latitude where a litigant is clearly trying to follow the judge's guidance.[132]

In *Great Future International Ltd. v. Sealand Housing Corporation*,[133] the judge concluded that, whilst a loose rein was applied when the personal litigants examined witnesses, some

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[124] *Re F* [2001] Fam.C.A. 348.
[125] *Jafari-Fini v. Skillglass Ltd and others* [2007] E.W.C.A. Civ. 261.
[126] *Couwenbergh v. Valkova* [2008] E.W.H.C. 2451 (Ch.).
[127] *Great Future International Ltd. and others v. Sealand Housing Corporation and others* [2001] All E.R. (D) 05 (Nov).
[128] *Watersheds Ltd. v. Dacosta and another* [2009] E.W.H.C. 1299 (Q.B.).
[129] *Buggs v. Buggs* [2003] E.W.H.C. 1538 (Ch.).
[130] [2007] E.W.C.A. Crim. 2379.
[131] [2006] E.W.C.A. Crim. 3062.
[132] *Family Bench Book*, para. 4.3.
[133] [2001] All E.R. (D) 05 (Nov).

rein had to be applied. When they persisted in asking leading questions of their own witnesses, the judge reminded them that this course, besides being unfair, detracted from the evidential value of the answers obtained. He imposed the control which counsel can ordinarily be relied on to impose on a witness he is examining directed at ensuring that the witness clearly and unequivocally answered the question asked and did not make speeches.

In dealing with personal litigants the maintenance of boundaries is perhaps more difficult than when all parties are represented. Nevertheless a judge will only have so much time to give to a case.[134] Therefore it is very important, particularly with personal litigants, to establish clear boundaries within which evidence may be received.[135]

F. Cross examination

Occasionally a self-represented litigant may demonstrate an extraordinary performance when cross-examining, showing a skill which is the envy of trained and experienced advocates, and dealing comprehensively and meticulously with all of the issues, leaving no stone unturned.[136] More often, however, a personal litigant will not be capable of conducting an effective cross-examination. For example, he may have very little idea of what he is trying to achieve,[137] or may attempt to put a series of questions designed to demonstrate that a witness is untruthful but none of the questions may be asked sufficiently precisely to explain with what issue the questions are concerned.[138] A cross-examination by a litigant in person may also be lengthy[139] or stray into irrelevancies.[140] A trial judge may therefore have to make

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[134] *Clarke v. City of Sunderland Council and another* (Court of Appeal (Civil Division), unreported, 7 April 2000).
[135] *Re H (Minors)* (Court of Appeal (Civil Division), unreported, 8 June 2000).
[136] *Official Receiver v. Doshi* [2001] 2 B.C.L.C. 235.
[137] *Microsoft Corporation v. Ezy Loans Pty Limited* [2004] F.C.A. 1135.
[138] *Barnett v. Semenyuk and another* [2008] All E.R. (D) 205 (Jul).
[139] *Legder-Beadell and another v. Peach and another* [2006] All E.R. (D) 245 (Nov).
[140] *Bale v. HSBC Bank p.l.c. and another* [2003] E.W.H.C. 1268 (Q.B.).

allowances for a personal litigant in his cross-examination of witnesses.[141]

A judge must maintain his role as an independent arbiter in an adversarial system. If the judge conducts cross examination on behalf of a personal litigant either instead of or before the litigant does so, a perception may be gained that the judge is unfairly assisting him.[142] While a judge can assist a self-represented litigant by making general suggestions about possible avenues for cross-examination, he cannot actually conduct the type of cross-examination that would be expected from an advocate.[143] A judge may remind a litigant about areas which he has not explored, and translate long, rambling statements into distinct questions. Where a witness has made an assertion, and a litigant has not challenged it, a judge may ask the litigant whether he is accepting what the witness has said or wishes to challenge the evidence by means of a question. However the judge should not cross-examine the other party's witnesses on behalf of the self-represented litigant,[144] nor should he formulate or suggest the actual questions.[145] Where it is the personal litigant who is being cross-examined, a judge may consider it appropriate to ask questions which would have been put by an advocate in re-examination. Further, if certain matters were put to the litigant on a clear mis-reading of documents, the litigant should be given assistance by the court.[146]

Counsel are trained to limit cross-examination to relevant matters and can expect to be criticised by the judge if they go outside that. Personal litigants naturally receive rather more

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[141] *Krasner v. Machitski and others* [2005] E.W.H.C. 1787 (Comm.).
[142] *Boylan-Toomey v. Boylan-Toomey* [2008] N.I. Fam. 15.
[143] *R. v. Phillips* [2003] A.B.C.A. 4 (CanLII).
[144] Moorehead and Sefton, "Litigants in Person: Unrepresented Litigants in First Instance Proceedings", Department of Constitutional Affairs, Research Series 2/05, March 2005.
[145] "Self Represented Litigants", Speech to the Magistrates' Conference, Justice Pierre Slicer, Supreme Court of Tasmania, the 14th June 2004. In *Bale v. HSBC Bank p.l.c. and another* [2003] E.W.H.C. 1268 (Q.B.), Davis J. stated that he had intervened "with a view to formulating questions". However it is clear that he did so to require their amendment for purposes of clarity.
[146] *Roberts v. Murray Lawrence and Partners* Employment Appeal Tribunal EAT/887/97.

lenient treatment. But even with a personal litigant**,** a time comes when the judge's duty to achieve progress in litigation makes it necessary to limit the scope of cross-examination.[147] Judicial interventions will also be justified where a personal litigant misunderstands the nature of cross-examination. For example, there is a fine line between a litigant putting his case to a witness and giving evidence; but that there is a line there cannot be any doubt. In *Korashi v. Swansea NHS Trust*[148] the litigant complained that he was not allowed to put his questions in full. He also complained that he was not allowed to give his evidence. However the litigant was not only asking questions but also giving his evidence at a time when it was inappropriate. The court was therefore correct to rein in inappropriate questions and to require the litigant to use the time of cross-examination appropriately, leaving time for his evidence when he gave it.

The judge may have to intervene to prevent witnesses from being cross-examined unfairly by a personal litigant.[149] However, here too a personal litigant may receive generous latitude. In *Sherry v. Gash*[150] a self-represented litigant cross-examined a witness in a most rigorous manner. The litigant was animated, excited, and aggressive in his cross-examination. There was finger-pointing and waving of the arms. Questions were asked in a very loud manner, almost shouting. He hectored the witness and, on a number of occasions, very aggressively called him a liar. Had he been counsel, the judge would have warned him about bullying tactics. Allowance was made for the fact that he was a layman, and for the fact that he felt aggrieved

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[147] *Johnson and another v. Farrer* (Court of Appeal (Civil Division), unreported, 3 May 2000).

[148] Employment Appeal Tribunal UKEAT/0847/04/LA. The Tribunal observed that, while a large number of interventions points to unfairness, if all were necessary there can be no unfairness. Further it observed that if the manner of interventions was inappropriate, that too can be unfair. It examined each of the interventions. They were in respect of case management decisions, decisions on relevancy, and on what was appropriate during cross-examination. The Tribunal concluded that the claimant "needed to be steered in relation to his evidence".

[149] *Secretary of State for Trade and Industry v. Crane and another* [2001] All E.R. (D) 148 (Apr).

[150] [1999] E.W.C.A. Civ. 766.

about the conduct of which he complained. Nevertheless, when the litigant descended simply to abuse of a witness, the judge stopped him. The position may be even more difficult where two personal litigants appear and where the bitterness of the parties, and their mutual distaste, may be prominent and unrepressed. Cross-examination of each party by the other can be constantly obstructed by this feature. In such circumstances the court may have to take a greater role in examining, and restraining, witnesses than would otherwise be the case.[151]

One particular difficulty experienced in recent years in England and Wales has concerned the desire of personal litigants in both criminal and civil proceedings to cross-examine victims of sexual abuse. In *R v. Milton Brown*[152] a defendant accused of rape insisted on subjecting his victims to cross-examination clearly designed only to intimidate and humiliate them. The Court of Appeal held that a trial judge was not obliged to allow a self-represented defendant to ask whatever questions, at whatever length, he wished, stating that it would often be desirable, before any question was asked, for the trial judge to discuss the course of proceedings with the defendant in the absence of the jury. The judge might then elicit the general nature of the defence and identify the specific points in the complainant's evidence with which the defendant took issue, and any points he wished to put to her. It held that it would almost always be desirable to allow a defendant to put questions to a complainant, but it should be made clear in advance that the defendant would be required, having put a point, to move on, and, if he failed to do so, the judge should intervene and secure compliance. If the defendant proved unable or unwilling to comply with the judge's instructions the judge should, if necessary to save the complainant from avoidable distress, stop further questioning by the defendant or take over the questioning of the complainant himself. Following *R v. Milton Brown*, Parliament urgently addressed practice and procedure in such cases, passing the Youth Justice and Criminal Evidence Act 1999, which provided for the appointment of legal representatives chosen by the court to cross-

[151] *Fletcher v. Davis and another* [2005] E.W.H.C. 632 (Ch.).
[152] [1998] E.W.C.A. Crim. 1486.

examine such witnesses. A number of other jurisdictions have also reformed the law in this area.[153]

A similar difficulty arose in civil proceedings in *H v. L*,[154] where a fact-finding hearing was necessary to determine the truthfulness of allegations that a personal litigant had sexually abused a child. A pre-hearing review took place which considered by whom the child should be cross-examined. The judge could see no distinction in policy terms between the criminal and the civil process, and considered that if it was inappropriate for a personal litigant to cross-examine such a witness in criminal proceedings, this was also true in the family jurisdiction. He therefore made an urgent request to the Attorney-General for him to provide an advocate to the court for that purpose, and the Attorney General exceptionally agreed to do so.

G. Discovery

The principal discovery difficulty caused by personal litigants is that they may give entirely inadequate discovery[155] and that there may be relevant documents which are missing or incomplete.[156] The judicial response to this will be fact-specific. In *Earles v. Barclays Bank*[157] the court held that the deficiencies by a personal litigant during the discovery process were probably

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[153] See, for example, New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials* (Report 101, 2003) and the Criminal Procedure Amendment (Sexual Offence Evidence) Act 2003; and the Canadian Criminal Code 486.3(1) as amended in 2005 by Bill C-2, an Act to Amend the Criminal Code (Protection Of Children And Other Vulnerable Persons) and the Canada Evidence Act.

[154] [2006] E.W.H.C. 3099 (Fam.).

[155] *Great Future International Ltd and others v. Sealand Housing Corporation and others* [2001] All E.R. (D) 05 (Nov). There can, of course, be other difficulties with the manner in which a self-represented litigant complies with his discovery obligations. Litigants in person may produce "excessive documentation" in their discovery: *English Churches Housing Group v. Avrom Shine* [2004] E.W.C.A. Civ. 434. Further, litigants in person may seek discovery in very wide terms supposing, wrongly, that the court has some inherent power itself to initiate active enquiries and to act as a sort of public detective on behalf of a litigant in person: *Waite v. Waite and others* (Court of Appeal (Civil Division), unreported, 11 November 1999).

[156] *Curtis and others v. Pulbrook and another* [2009] E.W.H.C. 782 (Ch.).

[157] [2009] E.W.H.C. 2500 (Mercantile).

due to his lack of appreciation of procedural rules and recognised that, in appropriate circumstances, a judge may decline to draw adverse inferences against him as a consequence. Some judges have granted even more generous latitude. In *Ouimet v. Seaboard Life Insurance Co*[158] the judge "departed from virtually all procedural rules to assist the plaintiff to get her case before the court". The plaintiff had not provided the defendant with any documents until the day of trial, and the judge ordered the plaintiff to show the defendant her documents in the courtroom. Ultimately, the plaintiff handed to the judge "a number of files and envelopes that were stuffed with bills, statements, and documents of various sorts". The action was then heard. There are of course limits to the latitude that will be given. In *Han v. Cho*[159] failure to attend for examination for discovery resulted in costs orders against self-represented defendants. In *Kemp v. Dickson*[160] the Supreme Court of British Columbia agreed that a self-represented plaintiff's action should be dismissed as a result of her failure to comply with an order to furnish a list of documents and an order to attend for discovery by examination. The court observed that while a self-represented litigant could not be held to the same standard as a lawyer in terms of compliance with court procedures and rules, a litigant who chose to represent herself could not ignore her responsibilities with impunity and fundamental failures must be treated as serious defaults. Often these failures will merely cause substantial frustration and waste resources. When persistent conduct prevented litigation from progressing at all, and when trial dates were lost through deliberate defaults, the failures may have an irreparable, negative effect on the just determination of a case. While the court recognised that it should be slow to strike out a claim on the basis of non-compliance with the rules, it concluded that this was an egregious case in which that was the only just remedy.

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[158] [2003] B.C.S.C. 115 (CanLII).
[159] [2008] B.C.S.C. 1621 (CanLII).
[160] [2006] B.C.S.C. 288 (CanLII).

H. Allowing Time

Personal litigants may require a generous allowance of time for many reasons.[161] A question may often arise as to whether a court should adjourn a hearing on the ground that the proceedings are too stressful; that the litigant is unable to prepare for the hearing because he is not a lawyer; that he is gravely disadvantaged by the absence of professional legal assistance; and that to continue in these circumstances would be a breach of his rights under Article 6 of the ECHR.[162] Judges should be properly sensitive to the disadvantages that such litigants face and should do their best to ensure that a personal litigant has a proper opportunity to present his case fully. This may require the granting of adjournments in circumstances in which no like adjournment would be granted to the represented litigant.[163] This is as true in terms of interlocutory steps as it is of a final hearing. There may be a difficult balance to be held in striving to do justice on the one hand to a personal litigant, who may be seeking an adjournment, and on the other hand to his represented opponent who may plausibly suggest that an adjournment is contrary to his interests. Not infrequently, these difficulties will be compounded by the fact that the circumstances which engage the judicial concern that the personal litigant may suffer serious prejudice, for example the loss of his home, bankruptcy or deportation as a failed asylum seeker, are the very circumstances which, human nature being what it is, are most calculated to encourage a litigant to "play the system" as long as he possibly

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[161] It would, of course, be incorrect to assume that if delay exists in a case it will necessarily have been caused by the personal litigant. For example in *Wright v. HSBC Bank p.l.c.* [2006] E.W.H.C. 1473 (Q.B.) it was the personal litigant who had sometimes to drive the litigation forward against the bank's inaction.

[162] *R (on the application of Janik) v. Standards Board for England* [2007] E.W.H.C. 835 (Admin.).

[163] *Williams v. Lemas and Anor* [2009] E.W.C.A. Civ. 360. Judges should of course be careful not to accept explanations regarding breached time limits too readily lest personal litigants get more favourable treatment from the court than those who act through lawyers, which would be unfair: *Cornish v. Hutchins* (Queen's Bench Division, unreported, Blofeld J., 25 March 1997).

can, stringing out the process and repeatedly seeking unjustifiable adjournments.[164]

Judges should ensure that represented parties do not seek to place self-represented parties under unfair time pressure. In *Re Multicultural Media Centre*[165] the judge had been faced with a personal litigant complaining that he had not had sufficient time to properly consider a vast bundle of evidential material which had only very recently been served on him. Neither the litigant nor the judge, could possibly have known which, if any, of the documents were immaterial until the whole bundle had been read. The case continued with the litigant, in effect, picking up the case against him as he went along. The Court of Appeal held in the circumstances that the process had not been fair. It was impossible to conclude that the litigant could have absorbed its contents to the extent necessary to make a properly considered response during the day that he was in court. In *Gosling v. St George's Healthcare NHS Trust*[166] a personal litigant had received a revised skeleton argument the evening before the hearing. The litigant complained that, not only was he unfamiliar with the law, but that he had had no opportunity, having no law library, to look at the cited authorities and statutory provisions. He needed time to decide how to meet the arguments against him. Particularly for a layman, that would require reflection. In those circumstances he sought an adjournment. The Employment Appeal Tribunal thought it an absolutely indefensible way of proceeding against a personal litigant to serve him with a copy of a skeleton argument the night before the hearing. In those circumstances it felt obliged to accede to his request for an adjournment, and expressed its deep disapproval of the way in which the litigant had been treated by the other side.

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[164] *R (on the application of Dirisu) v. Immigration Appeal Tribunal* [2001] E.W.H.C. Admin. 970.

[165] [2001] E.W.C.A. Civ. 1687.

[166] Employment Appeal Tribunal EAT/961/96. It must be borne in mind that personal litigants may be in the very difficult position of having to try and find the time to prepare their respective cases at the same time as earning their living: *Re Barings p.l.c.* [1997] All E.R. (D) 1.

Courts have also recognised that personal litigants may require a generous allowance of time to address them[167] and should demonstrate patience and understanding, offering breaks and adjournments where it would assist them.[168] In *Borden and Elliot v. Deer Home Investments*[169] the court noted that judges hearing cases where one party is self-represented must exhibit more patience and courtesy than might otherwise be required. Procedures and rules of evidence may well have to be explained more than once, regardless as to whether the time allotted for a hearing is thereby extended. That is not to say that an inordinate amount of time need be spent on relatively minor matters, or that rulings and instructions must be repeated many times over. It should be recognised, however, that the procedure may become more cumbersome and protracted than ordinarily, in order to provide not only a full and fair hearing, but also the perception of fairness.

A personal litigant may lack knowledge of the importance of time limits and be lulled into a false sense of security by understanding that the court may extend time.[170] Nevertheless, allowing latitude to personal litigants does not mean that courts will fail to apply time limits or time strictures to them. As a matter of principle, even in the case of personal litigants, it has to be understood that it is their responsibility to act in time. If litigants do not serve their documents on time, that is their responsibility.[171] In *Cornish v. Hutchins*[172] a personal litigant, who had been made aware of the relevant time limits which

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[167] *R v. Broadhead* [2006] E.W.C.A. Crim. 3062.

[168] *Jimenez v. Azizbaigi* [2008] B.C.S.C. 1465 (CanLII). In *Elt v. Orsler* [2001] E.W.C.A. Civ. 1226 the judge adjourned each day early when the litigant in person said she did not feel able to go on.

[169] (1992) 14 C.P.C. (3rd) 269.

[170] *Shade v. Peard Webster Pringle and John (a firm)* (Court of Appeal (Civil Division), unreported, 23 July 1998).

[171] *Warrington Borough Council v. Mulhall* (Court of Appeal (Civil Division), unreported, Buxton L.J., 30 July 1998). In *Great Future International Ltd. and others v. Sealand Housing Corporation and others* (Chancery Division, unreported, Lightman J., 1 November 2001) the court treated with exceptional mildness misconduct by the litigants in person who consistently failed to comply with the court timetable, most particularly for swearing affidavits.

[172] [2001] E.W.C.A. Civ. 846.

applied to her case and whose sheer volume of applications should have afforded her more than enough experience of the importance of abiding by time limits imposed by the court, was not given leave to appeal a refusal to extend time.

I. Autonomy

The principle of limited interference is applied to give a personal litigant appropriate autonomy as to the manner in which he conducts his case. It is for the litigant himself to decide what case to make and how to make it, and what evidence to adduce and how to adduce it. In *Williams v. Lemas*[173] the decision as to whether to give evidence and to prove the documents that the defendant thought would help his case was for him alone. When he indicated that he did not want to give evidence, the judge properly pointed out to him the consequences if he did not. The defendant, however, was adamant that he did not want to do so. It was his right to take that stance, however ill-advised. The judge could not compel him to give evidence if he did not want to.

A judge cannot become a personal litigant's tactical advisor, and is therefore required to respect the litigant's strategy in conducting the proceedings.[174] For a court to insist that an action must be tried in a particular way is for the court to override the autonomy of the litigant. A judge does not know, and subject to limits is not entitled to enquire, why a litigant takes one course rather than another. It is often the case that judges look with puzzlement at the decisions of litigants, even those advised by senior counsel. Ultimately, however, once a court has made proper enquiries of a self-represented litigant, the court must respect his autonomy. That, ultimately, is a matter of respect due to him; but, since the litigant risks his costs, it is also out of fairness to him. It is of course, also out of fairness to the opposing party. If a judge were to force upon the parties a trial of an issue which a litigant does not wish to litigate, then the court would not only be acting wrongly, but would be making a rod for the back of courts who have to do their duty to personal litigants.[175]

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[173] *Williams v. Lemas and Anor* [2009] E.W.C.A. Civ. 360.
[174] *R. v. Phillips* [2003] A.B.C.A. 4 (CanLII).
[175] *Nelson v. Halifax p.l.c.* [2008] E.W.C.A. Civ. 1016.

J. Avoiding Undue Pressure

The principle of limited interference is also observed by judges ensuring that personal litigants are not put under undue pressure. Judges are appointed to hear cases, not to provoke or bully the parties into settling them.[176] In *Westney International Ltd v. Deane*[177] a self-represented litigant complained that he was pressurised by the judge into accepting a settlement offer. The litigant asked to have at least the afternoon in order to obtain legal advice, but the judge gave him only 15 minutes. The litigant accepted the settlement reluctantly, stating that he could not stand the pressure any more. The Court of Appeal rejected his argument that he was pressurised into accepting the offer, but noted that it was the duty of a judge in an appropriate case to try to assist the parties to reach a compromise which would produce a substantial saving in costs to the parties and in court time. The court emphasised that this was particularly important where a litigant was acting in person but recognised that a judge must not put undue pressure on a personal litigant. A judge is entitled to, and in appropriate circumstances should, express views which he thinks are appropriate at a particular point, providing he bears firmly in mind the concept that he must not put undue pressure on either party.

While judges must do their best to avoid the imposition of undue pressure, it is incumbent upon self-represented litigants, by the stage that trial is reached, to be prepared to deal with such matters of fact and law as fall to be canvassed in the course of the action. While the court affords a personal litigant reasonable indulgence in various respects, that does not detract from the fact that, if a litigant represents himself, he must be prepared to deal with the issues which arise.[178]

R (on the application of Sweet) and another v. The First Secretary of State and Another[179] provides an example of how

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[176] *Wilson v. Ratcliffe Duce and Gammer* (Court of Appeal (Civil Division), unreported, 14 February 2000).
[177] *Westney International Ltd. v. Deane* (Court of Appeal (Civil Division), unreported, Swinton Thomas L.J., 7 November 1997).
[178] *Magee v. Grace and another* [1997] E.W.C.A. Civ. 1647.
[179] [2005] E.W.H.C. 689 (Admin.).

undue pressure should be avoided. An issue arose as to whether a losing personal litigant was prepared to agree an amount of costs. Forbes J told the litigant he was going to rise for a short time to enable the litigant to speak to the lawyers on the other side to see whether he could reach agreement with regard to costs. He emphasised that the litigant should not feel that, by being given that opportunity, the judge was putting him under any pressure to reach agreement and, if the litigant wanted time to reflect on the matter, then the judge would not prevent him from having that time. He clearly explained that this was not intended to put pressure on the litigant but was merely intended to give him an opportunity to see whether he could reach agreement.

K. Provision of Advice

The court, although it will try to assist personal litigants as far as it can, is not in a position to extend legal advice to them.[180] First, to do so may create an appearance of unfairness to the other parties. Secondly, the advice given may not be with full knowledge of the facts.[181] A judge must therefore walk the fine line between discharging an obligation to adequately inform the self-represented litigant of his rights in order that he may determine how to conduct his case whilst, at the same time, avoiding tendering advice which might give rise to a reasonable perception of inappropriate partiality.[182] The duty of the judge is therefore to ensure that the litigant is fully aware of the legal position in relation to the procedural and substantive aspects of the case, thereby putting him "in a position to make effective choices"[183] and "to participate meaningfully in the proceeding".[184]

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[180] *Crozier v. Midland Bank p.l.c. and others* (Court of Appeal (Civil Division), unreported, Walker L.J., 27 November 1997).
[181] *Johnson v. Johnson* [1997] Fam. C.A. 32.
[182] *Woodward v. Loadman* [2007] N.T.S.C. 60. Though the court subsequently vacated the order in this decision on technical grounds, the statement of principle remains valid: *Woodward v. Loadman* [2008] N.T.S.C. 6.
[183] *Kenny v. Ritter* [2009] S.A.S.C. 139.
[184] *Director of Child and Family Services (Man.) v. J.A.* [2006] M.B.C.A. 44 (CanLII).

Judges may point out the potential consequences of litigants' actions.[185] So a judge is entitled, particularly with a personal litigant**,** to suggest that he may have little or no prospect of success and that he would be wise to give up before incurring any more costs. In some cases, it is right and proper that a judge should make such comments.[186]

When it comes to obtaining advice, the principal mechanism whereby judges can assist a personal litigant is by allowing a McKenzie Friend. In many cases McKenzie Friends provide a valuable service, not only to the personal litigant but also to the court by reducing the litigant's understandable feelings of anxiety and confusion. In many instances the McKenzie Friend will assist the personal litigant to identify the relevant issues and to abbreviate his overall presentation.[187] Article 6 of the ECHR is engaged in any application by a personal litigant for the assistance of a McKenzie Friend. The purpose of allowing such assistance is to further the interests of justice by achieving a level playing field and ensuring a fair hearing and so there is a very strong presumption in favour of allowing an application. Such an application should not therefore be refused without good and compelling reasons. Neither the fact that a litigant appears to the judge to be of sufficient intelligence, or to have sufficient mastery of the facts, to be able to conduct the case without the assistance of a McKenzie Friend, nor the fact that the hearing is a directions or case management appointment, nor the fact that the proceedings are confidential, constitute a compelling reason for refusing such an application.[188]

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[185] In *N'Dow v. Timmis Desai Solicitors* (Court of Appeal (Civil Division), unreported, Holman J., 5 February 1998) the trial judge said "I have to make it perfectly clear to you – it is my duty to do so because you are a litigant in person – that if you proceed in this way you may be a great deal worse off than if you go on. That is not to say that you will necessarily get a lot of money out of this action; you may not. But one thing that is certain is that if you tell me you do not wish to proceed now I shall simply dismiss your action and give judgment against you, because I cannot do anything else".

[186] *Wilson v. Ratcliffe Duce and Gammer* (Court of Appeal (Civil Division), unreported, 14 February 2000).

[187] *Re G (Litigants In Person)* [2003] E.W.C.A. Civ. 1055.

[188] *In re O (Children) (Hearing in Private: Assistance) In re W (Children) In re W-R* (A Child) [2005] E.W.C.A. Civ. 759. Courts may on occasion take an

L. Judicial Communication

The principle of fairness and a self-represented litigant's unfamiliarity with legal procedures creates communication responsibilities for judges. The contextual difficulty was vividly described by the Supreme Court of Victoria in *Tomasevic v. Travaglini*[189] where, as a metaphor of personal litigants, it pictured a deaf mute sitting vulnerably in court while his case was being argued. The Supreme Court posed the question as to how, without understanding legal language, personal litigants could really know what they had heard or what they should say. It follows therefore, firstly, that judges have oral communication responsibilities in relation to personal litigants. The judge, in an enabling role, should make sure that a personal litigant is fully acquainted with the procedures he is going to adopt and thereafter should give positive and clear directions as to how he intends to proceed.[190] When directions are given by courts to personal litigants, the judge should explain the significance of compliance with those directions. Thereafter, failure to comply with directions can give rise to the same consequences for personal litigants as it might to represented litigants.[191] A judge, to be sure that he has understood a litigant's points, will often put them to him for confirmation.[192]

The Family Court of Australia has held that a judge should inform a personal litigant of the manner in which the trial is to proceed, the order of the calling of witnesses and the right

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exceptional course of allowing a McKenzie Friend to speak for a plaintiff. Where they do so this should not be taken as creating any precedent as to how those who have no right of audience can act as advocates for litigants in person. Anyone who aspires to be an advocate should obtain the requisite qualifications, and the court should be very slow to permit those who are allowed to be present in court as McKenzie Friends to act as advocates. That is not the proper function of a Mackenzie Friend: *Paragon Finance p.l.c. v. Noueiri* [2001] E.W.C.A. Civ. 1114.

[189] [2007] V.S.C. 337.

[190] *O'Connor v. Governors of St. Philomena's School* Employment Appeal Tribunal EAT/1356/96.

[191] *Lau Kin Wai Danny v. Chan Wai Sang & Another* [2002] HKCFI 921.

[192] *Camden and Islington Health Authority v. Fenwick* (Court of Appeal (Civil Division), unreported, 18 April 2000).

which he has to cross-examine the witnesses. He should also explain to the litigant any procedures relevant to the litigation.[193] The Canadian courts have declared that judges have a responsibility to inquire whether self-represented litigants are aware of their procedural options. Depending on the circumstances and nature of the case, judges may explain the relevant law and its implications, before the litigant makes critical choices.[194] In *R v. Phillips*,[195] for example, the trial judge explained to a self-represented defendant the presumption of innocence, the right to remain silent, the right to cross-examine witnesses, and the right to call witnesses in his defence. The judge outlined the trial process and provided detailed suggestions about how to cross-examine witnesses. Phillips indicated that he intended to call one witness and the judge made arrangements to have her attend. Phillips then asked for and received clarification about testifying in his own defence. The judge also indicated to Phillips that he was prepared to provide further assistance, but that he would be in a better position to provide guidance if Phillips chose to disclose his defence. The judge advised Phillips of the elements of the offences before the close of the prosecution case, when the judge had some understanding of the real issues in the case. At that time, the judge also explained the available defences, reiterated Phillips' right to call evidence and explained why he might choose to do so, and outlined matters that Phillips should consider bringing to the jurors' attention when he addressed them.

Secondly, judges will have responsibilities in written communications. In *Perotti v. City of Westminster*[196] the Court of Appeal expressed concern that a notice did not explain in any detail what was meant by the concept that a litigant's notice of appeal was listed for dismissal. If it was being listed to enable him to show cause why the notice of appeal should not be dismissed by reason of his failure to comply with an order or with the rules, it should have said so explicitly. The court considered it

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[193] *Johnson v. Johnson* [1997] Fam. C.A. 32.

[194] "Statement of Principles on Self-represented Litigants and Accused Persons", Adopted by the Canadian Judicial Council, September 2006, p. 7.

[195] [2003] A.B.C.A. 4 (CanLII).

[196] [2005] E.W.C.A. Civ. 581.

was important, particularly for personal litigants**,** that the procedure the court was adopting should always be transparently clear. In *Re G (Litigants in Person)*[197] the court stated that an order to which a penal notice is attached must be clear and easy to understand, particularly if it requires an act or prohibits an act by a personal litigant. Likewise, when preparing a written judgment in a field of law where personal litigants often appear, the court may find it necessary to set out its powers and functions clearly and simply. This is not only for the benefit of the lawyers, but to explain the position to any potential personal litigants or pressure groups who may take the judgment from the internet.[198]

Communication between judges and personal litigants can prove difficult. A judge has to try and get to the heart of the litigation and to identify the essential issues. In doing so, he may at times appear brisk or even brusque. However, judicial time is limited and sometimes briskness or even brusqueness may be necessary in order to push matters forwards.[199] Nevertheless it is important that in case management hearings the judge demonstrates a fair balance between the parties because the last thing that the judge wants is for the personal litigant to feel that, even before the hearing has commenced, they have an unsympathetic or biased judge.[200]

Personal litigants are as entitled as others to be treated with courtesy in court. Only rarely are personal litigants themselves discourteous. Although judges have on occasion experienced anger and abuse from personal litigants (notably at the conclusion of judgment), personal litigants are more commonly nervous, anxious or upset. Sometimes, as a consequence, they are less coherent and less self-controlled than they would be in other circumstances. The corollary to this is that any judge hearing a personal litigant is under an obligation to

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[197] [2003] E.W.C.A. Civ. 1055.

[198] *Re B-M (children) (care orders: risk)* [2009] E.W.C.A. Civ. 205.

[199] *Jones v. Jafferji and another (t/a Hamida Jafferji)* (Court of Appeal (Civil Division), unreported, 2 December 1999). Alternatively, there is a risk that when judges attempt to demonstrate sympathy to litigants in person they may be wrongly perceived as being patronising: *Morris v. Wiltshire and another* (Court of Appeal (Civil Division), unreported, 20 October 1999).

[200] "Striking A Balance: The Judge's Role", Speech by Justice Robert Nicholson, Prato, Italy, the 30th June 2006.

remain courteous to that litigant,[201] and the Court of Appeal does not hesitate to criticise judges who behave badly towards personal litigants.[202]

M. Finality

The principle of limited interference will not prevent a judge bringing proceedings to a final conclusion. Personal litigants with an ungovernable sense of grievance may be unable to see that in any system of law there must be finality, a stage at which decisions of the court are no longer open to appeal, review or collateral challenge.[203] It is quite frequent with personal litigants that the same matter is litigated repeatedly in slightly different guises. Applications tend to overlap and cover the same ground again and again.[204] Courts have therefore become increasingly concerned that a relatively small number of personal litigants can, by repeated applications and appeals and a disinclination to accept any decision as final, throw a quite disproportionate burden on the justice system that is unfair to other litigants.[205] Whilst the courts strive not to be inhospitable to

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[201] *In re O (Children) (Hearing in Private: Assistance); In re W (Children); In re W-R (A Child)* [2005] E.W.C.A. Civ. 759.

[202] *Re Bradford; Re O'Connell* [2006] E.W.C.A. Civ. 1199.

[203] *Ebert v. Venvil and others; Birmingham Midshires Mortgage Services Ltd. v. Ebert and another* (Court of Appeal (Civil Division), unreported, Walker L.J., 20 April 1999). Unhappily, it is common experience that litigants in person are dissatisfied with findings of fact which they do not like but which are made by the judge on the material before him. The fact that those findings are unpalatable to the would-be appellant does not give the appellant the right to take this matter further: *Bayley v. South Wight Borough Council* (Court of Appeal (Civil Division), unreported, Gibson L.J., 27 February 1997). Nor does the reaching of an adverse conclusion amount to evidence of judicial bias: *Ebert v. Venvil* (Court of Appeal (Civil Division), unreported, 19 December 2000).

[204] *Ebert and another v. Venvil (Trustee in bankruptcy of G Ebert)* (Court of Appeal (Civil Division), unreported, 11 August 2000).

[205] *Simmons v. Anthony Gold, Lerman and Muirhead (a firm) and another* (Court of Appeal (Civil Division), unreported, 31 March 2000). In *Schaer v. Barrie Yacht Club* [2003] CanLII 38484 (ON S.C.) the trial judge concluded that the plaintiff had used his self-represented litigant status as an additional arrow in his quiver of vexatious weaponry in the battle waged against the respondent. He had used the court as an additional front upon which to enlarge and intensify the conflict to the point that the portion of the war he waged

personal litigants when they seek to pursue rational claims in an intelligible way, they also have a duty to protect those who are on the receiving end of irrational, unintelligible and obsessive claims. The rights that litigants have generally to be unimpeded in their desire to litigate whensoever and against whomsoever they choose must therefore be balanced against the rights of those who are sued not to be harassed and vexatiously brought before the courts.[206]

In *Foden v. Foden*[207] the Court of Appeal refused a personal litigant permission to appeal against a refusal to adjourn her case. The judge had dealt with her with great patience. He had considered the difficulties faced by her in proceedings which had lasted for nine years. He had recognised that the stress of litigation had taken a toll on her health but not to the extent that she was incapable of appearing before him. On the other hand, the judge had to do justice not only to her respondent husband but also to other litigants who wished to make use of the courts' time. The judge had held that the time had come when he had to bring the long, drawn out proceedings to an end. The Court of Appeal concluded that he had had no option but to say that there must be an end to litigation at some time and, there being no indication that she would be better placed than she then was, he was right to proceed.

Although the court is always alert to give some leeway to personal litigants who have to operate in an unfamiliar field, there cannot be two procedural regimes, one for represented parties and another for the self-represented. A personal litigant may fall foul

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under the court's observation had become unfair. The plaintiff's strategy was to wear down his opponent with "unprecedented, incessant and capricious arguments" and with "incivility, irrelevant skirmishes, delay and expense".

[206] *HM Attorney General v. Robinson* (Queen's Bench Division (Crown Office List), unreported, Simon Brown L.J., 28 July 1999). In *Great West Life Assurance Co v. Royal Anne Hotel Co* [1986] CanLII 980 (BC C.A.) a personal litigant took advantage of the leeway traditionally accorded litigants in person, and did so in a way which, not infrequently, resulted in unfairness to other parties, in an intolerable degree of confusion in the proceedings, to a huge amount of unnecessary and useless court appearances and consequent waste of time, effort and money.

[207] *Foden v. Foden* (Court of Appeal (Civil Division), unreported, 24 February 2000).

of procedures which are designed to protect both sides and bring an end to litigation which should come to an end. In *Franklin v. Height*[208] the Court of Appeal held that a personal litigant knew about the time limit before its effluxion and could have taken more prompt steps than he did. The court could see no good ground for extending what was a substantial period of delay beyond the period allowed for service of a notice of appeal. The law generally recognises that it is in the public interest to have finality of litigation and there are many circumstances in which it could be argued that the principle of finality undermines that of fairness to particular litigants.[209]

IV. CONCLUSION

Self-represented litigants now form a prominent feature of the judicial landscape.[210] This has caused a dramatic change in the role of the trial judge[211] and represents a great challenge to the administration of justice.[212] The common law has long recognised the right of litigants in civil and criminal proceedings to appear for themselves.[213] Yet access to the courts is one thing; effective access is another. However hard the courts try to accommodate personal litigants it is unrealistic to suggest that such litigants are not often at a considerable disadvantage.[214] So too is the court. The adversarial system depends, not only for the justice of the ultimate outcome, but also for the efficiency with which the proceedings are conducted, upon the assumption that the

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[208] *Franklin v. Height* (Court of Appeal (Civil Division), unreported, Auld L.J., 12 March 1999). The court did, however, look at the merits of the proposed appeal and might have been prepared to allow the extension if it had thought that there was a realistic prospect of success.

[209] *R (on the application of Teluwo) v. Secretary of State for the Home Department* [2009] E.W.H.C. 2762 (Admin.).

[210] *R (on the application of Fleurose) v. Securities and Futures Authority Ltd and another* [2001] All E.R. (D) 189 (Apr).

[211] *Director of Child and Family Services (Man.) v. J.A.* [2006] M.B.C.A. 44 (CanLII).

[212] *Dew Point Insulation Systems Incorporated v. JV Mechanical Limited* [2009] CanLII 71721 (ON S.C.D.C.).

[213] *Kenny v. Ritter* [2009] S.A.S.C. 139.

[214] *Hamilton v. Al Fayed (No 2)* [2002] E.W.C.A. Civ. 665.

competing cases are being put by professionals who have the skills necessary to marshal evidence and argument, to identify the issues to be determined, to present the facts capably, and to understand and argue the law. For a system based upon that assumption, self-represented litigants are a serious problem.[215] The common law adversarial system of litigation is a modernised version of trial by battle, the outcome of which turned on the quality of champion which each party could afford to retain. There is more than a very serious risk that a self-represented litigant will fight the "wrong" fight against the wrong opponent on the wrong basis, will fail to call the right evidence, and will be unable by cross-examination or otherwise to meet the case made against him. The judge in the adversarial system has a very limited scope to play a part in adjusting the balance in representation of the parties. As under the rules governing trial by battle, his function is to ensure that the rules of battle are complied with by all parties and to decide the winner and loser in accordance with the rules. He cannot equalise the balance by charging into battle himself or by intervening, calling witnesses or giving directions or making the case for the disadvantaged litigant. He must take no action which might reasonably be seen as compromising his neutrality, however much he may be tempted to do so.[216]

Although the duties of the judge in relation to self-represented litigants are discussed in numerous cases, there is no common approach as to the manner and form in which assistance is provided which can be applied in practice to all circumstances. This is unsurprising bearing in mind the myriad of circumstances in which litigants may appear in person. However, the authorities do provide general guidance as to principles which should be applied.[217] Some jurisdictions have gone as far as to lay down formal guidelines for judges as to how cases involving personal

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[215] "The State of the Judicature", Speech by Murray Gleeson, Australian Legal Convention, Canberra, the 10th October 1999.

[216] "Access To Justice", speech by Mr Justice Lightman, The Law Society, the 5th December 2007.

[217] *Kenny v. Ritter* [2009] S.A.S.C. 139.

litigants should be handled.[218] Other jurisdictions have not been as prescriptive. For all jurisdictions, however, how to balance the competing imperatives of helping a litigant who is in need of assistance while maintaining impartiality is a recurring dilemma.[219] Appropriate judicial assistance will usually involve fine questions of judgment.[220] Ultimately, reasonable minds may differ as to the assistance which a personal litigant should be given[221] and the proper scope of the court's responsibility to a

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[218] The Family Court of Australia has set out the obligations on trial judges when hearing cases involving self-represented litigants. See *Johnson v. Johnson* [1997] Fam. C.A. 32 and *Re F* [2001] Fam. C.A. 348. The Canadian Judicial Council adopted its "Statement of Principles on Self-represented Litigants and Accused Persons" in September 2006. The Statement is advisory in nature rather than a code of conduct. It provides guidance to judges, court administrators, members of the Bar, legal aid organisations and government funding agencies in relation to self-represented persons. A potential difficulty with introducing formal guidelines for judges is that litigants in person may appeal on the ground that judges have failed to follow them and have failed to provide appropriate assistance for litigants. In *R v. Phillips* [2003] A.B.C.A. 4 (CanLII), a defendant argued that his trial was unfair because the trial judge had not given him adequate guidance. He submitted that the trial judge should have advised him that the prosecution had to prove he had the specific intent to kill in order to secure a conviction for attempted murder. Even in jurisdictions which have no such guidelines, however, personal litigants may find that appeal judges are receptive to the argument that a hearing was fundamentally flawed in that the litigant was afforded little in the way of explanation or assistance by the court in understanding what matters were being considered by the judge: *Magee v. Grace and another* (Court of Appeal (Civil Division), unreported, Judge L.J., 13 December 1996). A further line of potential argument is that unrepresented litigants may even appeal that a trial judge failed to adequately assist them, thereby demonstrating judicial bias: *Child and Family Services of Winnipeg v. J.A. et al* [2004] M.B.C.A. 184 (CanLII). In this case several examples were cited where the judge "might have reminded" the litigant of something that she had omitted or had otherwise failed to give her guidance and advice on the best course for her to follow.

[219] *Child and Family Services of Winnipeg v. J.A. et al* [2004] M.B.C.A. 184 (CanLII).

[220] *Platcher v. Joseph* [2004] FCAFC 68. Indeed the Federal Court of Australia observed that these will be difficult, and often impossible, for an appellate court to appreciate and evaluate fully.

[221] *Auscare Corporation Pty Ltd v. New South Wales Department of Commerce* [2007] NSWIRComm 271. An example of where reasonable minds might differ in the approach to be taken is that of *GE Commercial Finance Ltd v. Gee and others* [2005] E.W.H.C. 2056 (Q.B.) where Tugendhat J. stated that he had

personal litigant is necessarily an expression of a careful exercise of judicial discretion and cannot be fully described by a specific formula.[222]

refrained from exercising case management powers that he might otherwise have exercised if the defendants had been represented, such as requiring them to assist in clarifying the issues by making explicit which matters they agreed and which they contested with the consequence that the proceedings took much longer than they would have done if all the parties had been represented. Another judge might have felt it appropriate to administer more rigorous case management.

[222] *Frank M. Austin v. William P. Ellis and Joanmarie Ellis* 408 A.2d 784, 785 (N.H. 1979).